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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1434

GARY MANDEL, MICHAEL DE VITO and
THEODORE BUCKLEY,

Appellants,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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Appellee, the State of New York, by the undersigned counsel and pursuant to Supreme Court Rule 16, subdivision 1 (d), moves to dismiss or affirm on the grounds that the decision of the court below is so obviously correct as to warrant no further review.

Statement of the Case

Appellee adopts the statement of the case contained in the opinions of the Justices of the Appellate Division of the Supreme Court, Second Department.

ARGUMENT

POINT I

The rape shield statute, as applied, did not violate the appellants' Fifth and Sixth Amendment rights.

Lack of chastity is seldom "relevant to the issues of the victim's consent or credibility" in a sex offense case, whereas focusing upon the victim's prior sexual conduct "tends to demean the witness, discourages the prosecution of meritorious cases and leads to acquittals of guilty defendants" [Memorandum of Assemblyman Stanley Fink, accompanying Assembly Bill No. 6698, N.Y. Legis. Ann. 1975, pp. 47-48]. It was this stated realization that impelled the New York Legislature to enact the rape shield statute, Criminal Procedure Law §60.42. Predicated upon the irrelevancy of this highly prejudicial evidence in other than a few specific instances, this statute prohibits the admission of evidence of a victim's prior sexual conduct unless it satisfies requirements set forth in subdivisions 1 through 4, or is determined by the court, following an offer of proof or hearing, to be relevant and admissible in the interests of justice in accordance with subdivision 5.

In this case an offer of proof, pursuant to subdivision 5, was made by the defense of certain matter which the trial court ruled inadmissible, a ruling which the New York Court of Appeals determined did not constitute an abuse of discretion. The offer of proof consisted of statements concerning unrelated prior sexual conduct of the victim, evidence of prior alleged false rape complaints which were not demonstrated to be either false or similar, hospital records

of the victim's confinement for mental illness more than three years earlier, which included summaries of confidential psychiatric interviews with the patient and her family, a photograph allegedly of the complainant, that appeared in a "Swinger" or "Mixer" magazine and a statement signed by an 18-year-old male that he had seen a man, whom he was told was her father, beating the complainant with his fists on a prior occasion.

The factors impugning the relevancy of this proffered evidence compelled its exclusion even under traditional rules of evidence. These rules require the court to exclude evidence if it is too slight, remote or conjectural to have any legitimate influence in determining the facts in issue or if its probative value is outweighed by the danger it would confuse the issues and mislead the jury or cause undue prejudice to one of the parties [*Richardson on Evidence* §147 at 117 (10th Ed. 1973); 1 *Wigmore on Evidence* §§29, 29a at 411-12 (3rd Ed. 1941); McCormick, *Law of Evidence* §185 at 438 (2d Ed. E. Cleary 1972); Thayer, *Preliminary Treatise on Evidence at the Common Law* 516 (1898); *Federal Rules of Evidence,* Rule 303; *Uniform Rules of Evidence,* Rule 45]. Also *see Geders* v. *United States,* 425 U.S. 8, 86-7 (1976); *County of Macon* v. *Shores,* 97 U.S. 272 (1877). The resultant restrictions on cross-examination of the victim concerning these matters reflect the court's traditional "duty to protect [a witness] from questions which go beyond the bounds of cross-examination merely to harass, annoy or himiliate him." *Alford* v. *Unted States,* 282 U.S. 687 (1931); *accord, Davis* v. *Alaska,* 415 U.S. 308, 320 (1974).

The record amply supports the determination of the Court of Appeals that there was no abuse of discretion

either in the exclusion of evidence or the conduct of cross-examination, particularly in view of the medical findings of injuries and other corroborative evidence of the complainant's testimony. The trial court allowed considerable cross-examination concerning the victim's mental condition, including her hospitalization for mental illness, as well as references to a prior vaginal condition of the victim and prior parental beatings. Testimony was admitted from two witnesses concerning a diminution in size, after the incident, of the complainant's previously large bust and, although evidence of prior sexual conduct was excluded, there was testimony permitted concerning the so-called "Swinger" photograph of the victim. The application of the rape shield statute to exclude highly prejudicial irrelevant evidence which raised collateral issues and would have confused and distracted the jury clearly did not violate either the appellants' Fifth or Sixth Amendment rights.

POINT II

The application of the rape shield statute at the trial of offenses commited prior to its enactment did not violate the *ex post facto* clause.

It has long been recognized that so far as modes of procedure are concerned, a party in a criminal action does not have the right to insist that his case be disposed of under the law existing at the time of the crime. "Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose." [T. Cooley, *Constitutional Limitations* 272

(1868) cited in *Thompson* v. *Missouri,* 171 U.S. 380, 386 (1897)].

A victim's lack of chastity has never been considered a defense to a charge of forcible rape, sodomy, sexual abuse or assault [4 Blackstone, Commentaries 213; also *see People* v. *Magnum,* 31 Cal. App. 2d 374, 88 P. 2d 207, 211 (1939); *Humphreys* v. *State,* 227 Md. 115, 175 A. 2d 777, 780 (1961)]. Accordingly, Criminal Procedure Law §60.42 does not deprive the accused of a defense as did the statutory change in *Kring* v. *Missouri,* 107 U.S. 221 (1883). It merely sets forth a procedure for determining the admissibility of highly prejudicial evidence and requires an offer of proof by the accused in instances where such evidence appears to be irrelevant; i.e., instances not set forth in subdivisions 1 through 4 of the statute.

Criminal Procedure Law §60.42 does not make an innocent action a crime, nor make a crime greater than when it was done, nor inflict a greater punishment for a crime, nor alter the legal rules of evidence by requiring less or different testimony than required at the commission of the crime. It therefore does not fall within the constitutional admonition against *ex post facto* legislation according to the test set forth in *Calder* v. *Bull,* 3 Dallas 389 (1798) and reiterated in *Hopt* v. *Utah,* 110 U.S. 574, 590 (1894). Neither does it deprive an accused of a "substantial right," a standard later advanced in *Beazell* v. *Ohio,* 269 U.S. 167, 171 (1925).

As concerns the accused, Section 60.42 operates "only in a limited and unsubstantial manner to his disadvantage," *Beazell* v. *Ohio, supra,* 269 U.S. at 170. If it facilitates the

prosecutor's task, it does so by imposing a statutory limitation upon the admission of evidence which is highly prejudicial and, at best, remotely relevant; the exclusion of which would have been proper without the statutory pronouncement. *See Tracy* v. *Ohio,* 46 LW 3185 (Ohio Ct. App. 1976), *appeal dismissed, cert. denied* 43 U.S. 805 (1977). Application of the rape shield statute at the trial of sex offenses alleged to have been committed before its effective date, therefore, did not violate the *ex post facto* clause of the Constitution.

Conclusion

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed or the judgment and order of the New York Court of Appeals affirmed.

Respectfully submitted,

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